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No. 88-903

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., and MARK E. LIQUORI,
Petitioners,

v.

EUGENIE PARNAR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This Brief is, in part, a Supplemental Brief filed pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States and, in part, a Reply Brief filed pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States.

I. The Court Should Defer Considering The Petition For A Writ Of Certiorari Pending Its Decision In *Browning-Ferris Industries of Vermont, et al. v. Kelco Disposal, Inc., et al.*, No. 88-557.

On December 5, 1988, the Court granted certiorari in *Browning-Ferris Industries of Vermont, et al. v. Kelco Disposal, Inc., et al.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (December 5, 1988) (No. 88-556) on the issue of "[w]hether an award of $6,000,000 in punitive damages, amounting to more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise." The fundamental question of whether the Excessive Fines Clause of the Eighth Amendment applies to and limits punitive damages awards in civil actions un-

derlies the question presented in *Browning-Ferris*. The same fundamental question is presented in the Petition for a Writ of Certiorari filed by Petitioners. Therefore, the Court can preserve judicial resources by holding this Petition for consideration pending a decision in *Browning-Ferris*.[1]

II. The Petitioners' Constitutional Argument Was Properly Presented To The State Supreme Court And The State Court's Decision Necessarily Rested On Federal Constitutional Grounds.

The Respondent argues that the Petitioners failed to assert their constitutional argument in the statement of questions presented in their Opening Brief on Appeal and that, as a result, the issue was disregarded by the Supreme Court of Hawaii in compliance with Rule 3(b)(3) of the Rules of the Supreme Court of the State of Hawaii. The Respondent cites *Kang v. Harrington*, 59 Haw. 652, 656, 587 P.2d 285, 288 n. 1 (1978) in support of that argument (*See* Respondent's Brief in Opposition at page 13, n. 2). Respondent apparently relied

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[1] There are two additional Petitions for Certiorari pending which present the issue of whether the Eighth Amendment Excessive Fines Clause applies to punitive damages. *Metromedia, Inc. v. April Enterprises, Inc.*, No. B022890, *slip op.* (Cal. Ct. App. June 9, 1988), *petition for cert. filed*, No. 88-625 (October 14, 1988); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *petition for cert. filed*, No. 88-626 (October 14, 1988). In addition, a Petition for Certiorari is pending in *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *petition for cert. filed*, No. 88-855 (November 23, 1988). In that case the Court is asked whether the Eighth Amendment Excessive Fines Clause applies to civil contempt sanctions. Thus, it raises the same fundamental question of whether the Eighth Amendment Excessive Fines Clause applies in civil proceedings. Petitioners assume that the Court will hold all of these cases pending its decision in *Browning-Ferris*.

On January 23, 1989, the Court denied cert. in *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987), *cert. denied*, 57 U.S.L.W. —— (U.S. Daily Edition January 25, 1989) (No. 88-157). That case, *inter alia*, raised the issue of whether a punitive damages award violated the Eighth Amendment. This case is distinguishable from *Nationwide* because in *Nationwide* the Eighth Amendment issue was first raised in a Petition for Certiorari.

on the statement of Rule 3(b)(3) quoted in *Kang*. When the Petitioners appealed this case to the Supreme Court of Hawaii on August 18, 1987, Rule 3(b)(3) was no longer in existence. Effective June 1, 1984, portions of the Rules of the Supreme Court of the State of Hawaii, including Rule 3(b)(3), were deleted and superseded by the Hawaii Rules of Appellate Procedure and the Petitioners, therefore, were subject to the Hawaii Rules of Appellate Procedure.

Rule 28(b)(6) of the Hawaii Rules of Appellate Procedure requires that an opening brief on appeal include a statement of questions presented and, like its predecessor Rule 3(b)(3), states that questions not presented will be disregarded.[2] Rule 28(b)(6) also states, however, that "the statement of a question will be deemed to include every subsidiary question fairly comprised therein" and requires that questions be set forth "in the most general terms possible." Haw. R. App. P. 28(b)(6). The Petitioners' statement of questions presented in their Opening Brief on Appeal included the following question:

> [d]id the trial Court err in not granting a new trial given an unreasonable and unwarranted verdict rendered by the jury which indicated a decision based upon passion, sympathy and prejudice . . . .

The question generally raised the issue of whether the punitive damages award, as one element of the jury verdict, was "unreasonable and unwarranted." Whether the award was constitutionally excessive was discussed as a subsidiary question in the Petitioners' Opening Brief on Appeal and was fairly comprised within the question presented. Petitioners have satisfied Rule 28 and, there-

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[2] Hawaiian courts have not strictly enforced Rule 28. *See Bow v. Nakamura*, 719 P.2d 1103 (Haw. Ct. App. 1986) (The court noted that plaintiff's brief violated Rule 28 because it failed to quote challenged findings of fact but, because the plaintiff's argument clearly indicated what findings were challenged, the court did not disregard the challenges pursuant to Rule 28 but decided the issues presented).

fore. Respondent's argument that the constitutional issue may have been disregarded pursuant to Rule 3(b)(3) fails.

III. The Respondent Has Misconstrued Petitioners' Arguments Regarding The Excessiveness Of The Punitive Damages Award.

Respondent's argument regarding the appropriateness of punitive damages awards in cases involving wanton or oppressive conduct is largely irrelevant. Even though Petitioners do not believe their conduct was either "wanton or oppressive", they have not contested the appropriateness of an award of punitive damages in the proceedings before this Court. Instead, the Petitioners herein challenge *the amount* of the award. In addition, Respondent's arguments warrant some reply.

First, in order that the record before the Court be accurate, Petitioners note that the Respondent has cited *Hall v. American Airlines, Inc.*, 1 Haw. App. 258, 1 Haw. App. 312, 617 P.2d 1230 (1980) and *Quedding v. Arisumi Bros., Inc.*, 66 Haw. 355, 661 P.2d 706 (1983) for the proposition that "Hawaii cases awarding punitive damages focus on the defendant's state of mind" (*See* Respondent's Brief in Opposition, at p. 15). The courts in *Hall* and *Quedding*, however, did not award punitive damages. In each case the court concluded that there was insufficient evidence to support a conclusion that the parties had engaged in wanton or reckless behavior.

Second, Respondent accurately notes that the Petitioners have not introduced evidence regarding their inability to pay the punitive damages award. That point is, however, irrelevant. Petitioners conceded that they are able to pay the award (*See* Petitioners' Petition for a Writ of Certiorari, at p. 19). Contrary to Respondent's argument, the fact that they are able to pay the award does not foreclose a conclusion that the award is disproportionate to their economic resources. Although courts have considered the ability of a party to pay an

award of punitive damages as a factor in assessing the excessiveness of an award, they have also concluded that a fine is excessive if it is disproportionate to the economic resources of even a wealthy defendant. *People v. Ingham*, 115 Misc. 2d 64, 453 N.Y.S.2d 325, 328 (N.Y. Crim. Ct. 1982). Obviously any fine is disproportionate to the resources of a defendant who has no resources. All defendants, however, are protected by the Eighth Amendment Excessive Fines Clause from fines that exact a disproportionate amount of their resources. The parties stipulated to the Petitioners' net worth and the punitive damages awarded in this case represents 15% of the Petitioners' stipulated net worth.[3] Regardless of whether the Petitioners can pay that amount, the punitive damages award clearly exacts a disproportionate amount of their net worth.

Finally, the Respondent argues that the cases cited by Petitioners to demonstrate that the punitive damages award in this case is excessive, when compared to punitive damages awarded in more egregious situations, are irrelevant because each case must turn on its own facts (*See* Petitioners' Petition for a Writ of Certiorari, at p. 20 and Respondent's Brief in Opposition, at p. 18). Petitioners agree that a punitive damages award must be related to the facts of a case. An award of punitive damages, however, cannot be evaluated in a vacuum. The

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[3] It is interesting to note that the punitive damages award challenged in *Browning-Ferris* comprised only .6% of Browning-Ferris' net worth (*See* Petition filed in *Browning-Ferris*, at p. 29). Thus the award at issue here represents a far greater proportion of the Petitioners' net worth than that at issue in *Browning-Ferris*. In addition, the Respondent cites *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986) for the proposition that a punitive damages award is only excessive if it cannot be paid. Respondent neglects, however, to note that in *Transgo*, the court concluded that awards of 5% and 2.5% of the parties' net worths were not excessive. The court was not dealing with a case involving 15% of a party's net worth which is at issue here.

facts must be compared to the facts of other cases in which punitive damages have been assessed and the amount of the award compared to damages awarded in similar circumstances. *See Solem v. Helm*, 463 U.S. 277, 291 (1983) (considering excessiveness of a criminal punishment under the Cruel and Unusual Punishments Clause of the Eighth Amendment); *Sizemore v. Commonwealth*, 485 S.W.2d 498, 500 (Ky. 1972).

The cases cited in Petitioners' Petition for a Writ of Certiorari demonstrate that the Petitioners' actions in this case were much less egregious than those of other individuals subjected to punitive damages, but that the punitive damages awarded far exceeded the damages awarded in the more egregious cases.

CONCLUSION

The Petitioners respectfully suggest that the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of Hawaii be held pending the Court's decision in *Browning-Ferris*.

Respectfully submitted,

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